

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

In the Matter of:

City of Lynchburg

Respondent.

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**ADMINISTRATIVE ORDER
ON CONSENT**

Docket No. CWA-03-2013-0129DN

I. PRELIMINARY STATEMENT and STATUTORY AUTHORITY

1. EPA has made the following findings of fact and issues this Administrative Order on Consent (Consent Order) pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under Section 309(a) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(a). This authority has been delegated by the Administrator to the Regional Administrator of EPA Region III, and further delegated to the Director, Water Protection Division, Region III.

2. Section 309 of the Act, 33 U.S.C. § 1319(a), provides, *inter alia*, that whenever on the basis of any information available to him the Administrator finds that any person is in violation of any permit condition or limitation implementing certain CWA sections in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342, he shall issue an Order requiring such person to comply with such section or requirement.

II. FINDINGS of FACT and CONCLUSIONS OF LAW

3. Section 301(a) of the Act, 33 U.S.C. § 1311, prohibits the discharge of any pollutant by any person from a point source to navigable waters except in compliance with, among other things, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

4. Section 402 of the Act, 33 U.S.C. § 1342, provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants or may authorize

states to issue such permits.

5. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.2 and 122.26 provide that, with some exceptions not relevant here, storm water discharges are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).

6. Section 402(p) of the Act, 33 U.S.C. § 1342(p), provides that discharges from a municipal separate storm sewer system (MS4) and storm water discharges associated with industrial activity may be subject to NPDES permitting requirements.

7. Pursuant to 40 C.F.R. §122.26(a)(9)(i), small MS4s require an NPDES permit if they are required to be regulated pursuant to 40 C.F.R. § 122.32.

8. The City of Lynchburg, Virginia (“Lynchburg”, “City” or “Respondent”) is a municipality within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

9. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” *Id.* § 122.26(b)(13).

10. The term “municipal separate storm sewer system” or “MS4” is defined, in part, as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains): (i) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.” 40 C.F.R. § 122.26(b)(8)(i).

11. The term “small municipal separate storm sewer system” or “small MS4” means “all separate storm sewers that are: (i) Owned or operated by the United States, a State, city, town, borough . . . or other public body (created by or pursuant to State law) having jurisdiction over disposal of . . . storm water. . . .; [and] (ii) Not defined as “large” or “medium” municipal separate storm sewer systems.” 40 C.F.R. § 122.26(b)(16).

12. Pursuant to 40 C.F.R. §122.32(a)(1), the Virginia Department of Conservation and Recreation (“VADCR” or “the Department”) has determined that Lynchburg is a small MS4 located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census, and accordingly requires an NPDES permit

13. Therefore, Lynchburg is a “small MS4” within the meaning of 40 C.F.R. § 122.26(b)(16).

14. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Commonwealth of Virginia to issue NPDES permits in 1975. In 1991, EPA authorized Virginia to issue General NPDES Permits.

15. On July 9, 2008, VADCR issued a General NPDES Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems a/k/a Authorization to Discharge (MS4 Permit) to Lynchburg. The Permit is scheduled to expire on July 8, 2013.

16. The MS4 Permit authorizes discharges of storm water from Respondent’s MS4 to waters of the Commonwealth of Virginia with exceptions that are not relevant here.

17. On March 5 and 6, 2012 representatives of EPA conducted an inspection of Lynchburg’s MS4 program implementation.

18. On November 2, 2012, EPA issued the City of Lynchburg, Virginia Municipal Separate Storm Sewer System (MS4) Program Inspection Report (Inspection Report), which included, in addition to general information regarding the City’s MS4 program and history, fourteen (14) observations regarding the City’s MS4 Program related to the requirements of the current MS4 Permit (VAR04, effective July 9, 2008). The Inspection Report also included 8 attachments (exhibit log, photo log, document log, etc.).

19. The City received a copy of the Inspection Report by electronic mail dated February 7, 2013. The City prepared and submitted a response to EPA on March 25, 2013.

20. Based upon the March 5 and 6, 2012 inspection, EPA identified three categories of violations, among the fourteen (14) observations, which it has concluded were violations of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311. This Consent Order addresses these categories and directs the City to take the corrective action described below to comply with its current MS4 Permit (VAR04, effective July 9, 2008).

21. Section II.B.4.a of the MS4 Permit states that “the operator shall develop, implement, and enforce procedures to reduce pollutants in any stormwater runoff to the regulated small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or equal to or greater than 2,500 square feet in all areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations adopted pursuant to the Chesapeake Bay Preservation Act.”

22. EPA observed a number of stormwater control deficiencies at the private construction projects it visited during the March 5 and 6, 2012 inspection. These deficiencies included, among others, inadequate inlet protections, and sediment tracking observed on the

roadway adjacent to a site's construction entrance.

23. Section II.B.5.b(4) of the MS4 Permit requires Lynchburg to require "adequate long-term operation and maintenance by the owner of structural stormwater management facilities through requiring the owner to develop a recorded inspection schedule and maintenance agreement to the extent allowable under state, tribal or local law or other legal mechanism. The operator shall additionally develop, through the maintenance agreement or other method, a mechanism for enforcement of maintenance responsibilities by the operator if they are neglected by the owner".

24. At the time of the inspection, Lynchburg had not established the maintenance agreements described in Paragraph 23 for 2 privately owned post-construction structural stormwater management facilities (also known as post-construction BMPs) within the City.

25. Section II.B.5.b.(5) of the Permit requires Lynchburg to "conduct site inspection[s] and enforcement measures [of post construction BMPs] consistent with the Virginia Stormwater Management Act and attendant regulations." At the time of the inspection, the City had not developed a program or procedure for verifying the accuracy of BMP inspection records submitted to the City by private BMP owners and the City did not have a guidance document or procedure for enforcement to ensure adequate long-term operation and maintenance of post-construction BMPs in the City.

26. Section II.B.6 of the Permit, Pollution Prevention/Good Housekeeping for Municipal Operations, requires the City "develop and implement an operation and maintenance program consistent with the MS4 Program Plan that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations...The operator shall identify, implement, evaluate and modify, as necessary, BMPs to meet the following pollution prevention/good housekeeping for municipal operations measurable goals: a. Operation and maintenance programs including activities, schedules, and inspection procedures shall include provisions and controls to reduce pollutant discharges into the regulated small MS4 and receiving surface waters; b. Illicit discharges shall be eliminated from storage yards, fleet or maintenance shops, outdoor storage areas, rest areas, waste transfer stations, and other municipal facilities; c. Waste materials shall be disposed of properly; d. Materials that are soluble or erodible shall be protected from exposure to precipitation; e. Materials, including but not limited to fertilizers and pesticides, that have the potential to pollute receiving surface waters shall be applied according to manufacturer's recommendations; and f. For state agencies with lands where nutrients are applied, nutrient management plans shall be developed and implemented in accordance with the requirements of §10.1-104.4 of the Code of Virginia."

27. At the time of the inspection, EPA observed multiple stormwater control measure deficiencies at the municipally-owned sites it visited during the March 5 and 6, 2012 inspection. These deficiencies included, among others, not establishing inspection schedules or utilizing drip pans to prevent vehicle fluids from contacting stormwater during rain events, and not protecting

storm drain inlets downgradient from storage and unloading areas from pollutant exposure.

28. Based upon the inspection, EPA has concluded that Respondent's failures to: 1) identify and implement, evaluate and modify as necessary, BMPs to eliminate illicit discharges from public works yards, storage yards, fleet or maintenance shops, and outdoor storage areas; 2) develop, implement, and enforce procedures to reduce pollutants in any stormwater runoff to the regulated small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or equal to or greater than 2,500 square feet; 3) and ensure the adequate long-term operation and maintenance of structural stormwater management facilities by the owners through requiring development of recorded inspection schedules and maintenance agreements to the extent allowable under state, tribal or local law or other legal mechanism, violate the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. ORDER

AND NOW, this _____ day of _____, 2013, pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), having taken into account the seriousness of the violations and any good faith efforts by Respondent to comply with section 301(a) of the Act, Respondent is hereby ORDERED, pursuant to Section 309(a) to do the following:

1. Respondent shall take all actions necessary to comply with its MS4 Permit, including:
 - a. Develop and implement a plan within 6 months of the effective date of this Order to inspect all active construction sites with E&S controls on an established schedule and to pursue enforcement on active construction sites based upon set criteria. Submit this plan to EPA for comment;
 - b. Develop and implement a plan within 6 months of the effective date of this Order to ensure the post-construction structural stormwater management facilities are inspected by the applicable owners and that proper enforcement measures are taken when necessary. Submit this plan to EPA for comment;
 - c. Develop and implement a plan within 6 months of the effective date of this Order to review, modify and implement Standard Operating Procedures (SOP) as necessary and provide training regarding SOP modifications for appropriate city employees to meet the pollution prevention/good housekeeping goals for municipal operations outlined in Lynchburg's MS4 Permit. Submit this plan to EPA for comment.

2. All documents required by Paragraph 1 of this Section shall be accompanied by a certification signed by a responsible corporate officer, as defined in 40 CFR § 122.22(d), that reads as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signed _____
Title _____

All documents required herein shall be submitted to:

Matthew R. Colip
NPDES Enforcement Officer
NPDES Enforcement Branch
Mail Code (3WP42)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

IV. GENERAL PROVISIONS

1. Issuance of this Consent Order is intended to address the violations described herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. Further, EPA reserves any existing rights and remedies available to it under the CWA, 33 U.S.C. §1311, et seq., the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction. Further, EPA reserves any rights and remedies available to it under the CWA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this Consent Order, following its effective date (as defined below).

2. This Order does not constitute a waiver or modification of the terms or conditions of the City's MS4 permit. Compliance with the terms and conditions of this Order does not relieve the Respondent of its obligations to comply with any applicable federal, state, or local law or regulation.

3. For the purposes of this proceeding, the City neither admits nor denies the factual

allegations and conclusions of law set forth in this Order.

4. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. By entering this Order, the City does not admit any liability for the civil claims alleged herein.

V. EFFECTIVE DATE

This ORDER is effective after receipt by Respondent of the final executed document.

SO ORDERED:

Date: _____

Jon Capacasa
Director, Water Protection Division
U.S. EPA Region III

AGREED TO:

For City of Lynchburg:

Date: _____

Name

Title